Office-Supreme Court, U.S.
FILED
JUN 3 1981
CLERK

80-1850
NO.

In the Supreme Court of the United States

OCTOBER TERM, 1980

IN RE: JAMES DWIGHT VICKERS
a/k/a J. D. VICKERS
a/k/a JIM VICKERS
a/k/a JIMMY VICKERS

COLONIAL BANK OF NEW ORLEANS, *Petitioner*

v.

JAMES DWIGHT VICKERS, *Respondent.*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

J. MURRAY AKERS
AKERS & GRIFFIN
149 N. EDISON, SUITE B
P. O. Box 1076
GREENVILLE, MISSISSIPPI 38701
(601) 378-2131

Attorney for Respondent

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED FOR REVIEW

1. Did the Bankruptcy Court make clearly erroneous findings of fact in concluding that Respondent Bankrupt did not submit to Petitioner a materially false written financial statement to obtain money on credit?

2. Did the Bankruptcy Court make clearly erroneous findings of fact in concluding that Respondent Bankrupt explained satisfactorily losses of assets or deficiency of assets to meet his liabilities?

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Authorities iii

Statute 2

Statement of the Case 2

Summary of Argument 6

Argument 6

Conclusion 9

TABLE OF AUTHORITIES

Page

CASES:

United States vs. United States Gypsum Company, 333 U.S. 364 (1948) 7

In Re: Bleaufontaine, Inc., 634 F.2d 1383, (5th Cir. 1981) 7

STATUTES:

11 U.S.C. § 32 (c) (3) 3

11 U.S.C. § 32 (c) (7) 3

RULES:

Supreme Court Rule 17.1(a) 2, 6

TREATISE:

5A *Moore's Federal Practice*, ¶ 52.03 [1] (1980) 7

NO. 80-1850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

IN RE: JAMES DWIGHT VICKERS
a/k/a J. D. VICKERS
a/k/a JIM VICKERS
a/k/a JIMMY VICKERS

COLONIAL BANK OF NEW ORLEANS, *Petitioner*

v.

JAMES DWIGHT VICKERS, *Respondent.*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATUTES AND RULES

Supreme Court Rule 17.1(a)

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

STATEMENT OF THE CASE

On November 17, 1978, the Respondent, James Dwight Vickers (hereafter Vickers), filed his voluntary petition in bankruptcy in the Northern District of Mississippi. On February 15, 1979, the Petitioner, Colonial Bank of New Orleans (hereafter Colonial Bank), filed a complaint objecting to Vickers' discharge in bankruptcy. One ground of objection to discharge was that Vickers had obtained substantial sums on credit from Colonial

Bank by submitting a materially false written financial statement to it. Another ground raised was that Vickers could not satisfactorily explain his losses or deficiency of his assets to meet his liabilities. *See* 11 U.S.C. § 32(c)(3) & (7).

During a two-day trial ending May 11, 1979, the Bankruptcy Court received evidence on these issues. At that time, Colonial Bank attempted to introduce into evidence a written financial statement allegedly executed by Respondent on April 30, 1977. Colonial Bank's President, through whom the exhibit was offered, testified that this was the only statement of Respondent's financial condition he had ever seen. However, he could not say how or when Petitioner came into possession of the financial statement, and neither he nor any other witness saw Vickers sign the bottom of the document, where a signature purporting to be his appears.

Vickers himself denied that either the signature or the financial statement was his. He testified that the statement he did give the Petitioner consisted of several pages, rather than only one, and that it was accompanied by a series of explanatory notes and an accountant's statement explaining Vickers' interest in another company. Moreover, Vickers' father, his accountant, and one of the senior Vickers' bookkeepers testified that they were well acquainted with Respondent's signature and that the signature appearing on the bottom of the alleged financial statement was not his.

Vickers stated that on the personal financial statement he did give Petitioner, he listed as an asset his home in Chicot County, Arkansas. In his testimony, Vickers did not assign a value to the house. He did testify that at the time he executed his personal financial statement, he was in the process of becoming divorced, yet considered the house partially his because no divorce decree had been entered. The proof at trial showed that Vickers continued to spend considerable amounts of money on the house to improve it and to complete its construction. The proof also showed that Petitioner had an appraisal made of the home prior to disbursing any loan funds. The appraiser estimated the value of the house at $300,000.00. Petitioner checked the title to the house before accepting it as security for the loan and took the further step of protecting itself by having both Vickers and his wife execute the mortgage.

Vickers also listed on the financial statement that he did submit to Petitioner a $200,000.00 asset relating to a stock acquisition of Mainstream Shipyards. This asset was valueless if Vickers did not carry through with the purchase of Mainstream Shipyards. The proof showed that in a footnote to this financial statement, Vickers fully disclosed the nature of the asset and that it was contingent upon his purchase of the shipyard. This option remained open to Vickers at the time of trial.

At trial, Vickers explained in detail his losses or deficiencies of his assets to meet his liabilities between the time he

made his financial statement and the time he filed bankruptcy. The proof showed that Vickers invested a considerable amount of his money into improving the status of a business venture he had taken over. There was no proof that Vickers had transferred, removed or concealed assets with intent to hinder, delay or defraud his creditors, and there was no proof that he failed to keep adequate books and records.

On May 31, 1979, the Bankruptcy Judge dismissed Petitioner's complaint. On the basis of the evidence outlined above, he found as facts that (1) the financial statement proffered by Petitioner contained a forged signature and was therefore not the financial statement Vickers had submitted to it, (2) Vickers' authentic financial statement contained true and correct information, and (3) Vickers' explanations concerning losses or deficiencies of assets were cogent and convincing. These factual findings led to the Court's conclusions of law (1) that Vickers did not obtain money on credit through use of a materially false written financial statement, and (2) that Vickers explained satisfactorily losses of assets or deficiency of assets to meet his liabilities.

On February 13, 1980, the United States District Court for the Northern District of Mississippi summarily affirmed the Bankruptcy Judge's decision. By *per curiam* decision of November 24, 1980, the United States Court of Appeals for the

Fifth Circuit affirmed the District Court's decision, and on February 19, 1981, denied Colonial Bank's Petition for Rehearing.

SUMMARY OF ARGUMENT

Petitioner contends that this Court should review the decision of the United States Court of Appeals for the Fifth Circuit because that Court "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Supreme Court Rule 17.1 (a). The departures alleged are the Bankruptcy Court's erroneous findings of fact and the appellate courts' failure to set them aside. To prevail, Petitioner must show that the Bankruptcy Court's findings of fact were supported by no substantial evidence and were against the clear weight of the evidence. Review of the Statement of the Case above, and of the Bankruptcy Court's thorough Memorandum Order, illustrates that Petitioner cannot meet the burden the law places on it.

ARGUMENT

Petitioner seeks review before this Court based on Supreme Court Rule 17.1(a), which recites as one reason for granting review on writ of certiorari that a Federal Court of Appeals

"has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." Petitioner contends that the United States Court of Appeals for the Fifth Circuit has widely departed from the normal course of judicial proceedings by failing to apply correctly the clearly erroneous rule of appellate review. As stated in the seminal case *United States vs. United States Gypsum Company*, 333 U.S. 364, 395 (1948), a finding of fact is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." An appellate court must not overturn a lower court's findings of fact unless there is no substantial evidence to sustain them and they are against the clear weight of the evidence. 5A *Moore's Federal Practice*, Para. 52.03[1] (1980). This standard of review applies to findings of fact made in bankruptcy proceedings. *In Re: Bleaufontaine, Inc.*, 634 F.2d 1383, 1389 (5th Cir. 1981).

The clearly erroneous rule applies only to findings of fact and not to conclusions of law. Conclusions of law are subject to *de novo* review by appellate courts. Although Petitioner has couched its Questions Presented for Review in terms of the

clearly erroneous rule, in fact Petitioner would have this Court apply the clearly erroneous rule to the lower courts' conclusions of law rather than to the Bankruptcy Court's findings of fact.

With respect to the issue whether Vickers secured credit by use of a materially false written financial statement, the Bankruptcy Court found as facts that the financial statement proffered by Petitioner was not the financial statement given to it by Respondent and that the financial statement Respondent did give to Petitioner contained no false statements. Because the record contained no evidence that Respondent made a false statement in writing about his financial condition, the Bankruptcy Court concluded, as a matter of law, that Repondent should not be denied discharge in Bankruptcy on the allegation that he had submitted a materially false written financial statement in order to obtain credit. Viewing this legal conclusion as inescapable given the facts found by the Bankruptcy Court, the Fifth Circuit Court of Appeals determined that these factual findings were supported by the clear weight of the evidence and therefore affirmed the Bankruptcy Court's decision.

The Fifth Circuit Court of Appeals engaged in a similar process in considering Petitioner's contention that Respondent failed to explain satisfactorily losses of assets or deficiency of assets to meet his liabilities. The Bankruptcy Court found as a fact that Respondent came forth with cogent and convincing

explanations as to what had happened to his assets. In particular, the Bankruptcy Court noted that Petitioner itself determined Respondent's home was worth $300,000.00 and took it upon itself to research its title. Again, viewing the legal conclusion that Respondent satisfactorily explained losses of assets or deficiency of assets to meet his liabilities as mandated by the Bankruptcy Court's findings of fact, the Fifth Circuit Court of Appeals affirmed the Bankruptcy Court's ruling after determining that the Bankruptcy Court's findings of fact were supported by substantial evidence and were not against the clear weight of the evidence.

CONCLUSION

The facts recited in the Statement of the Case and in the Bankruptcy Court's Memorandum Order illustrate that the Bankruptcy Court's findings of fact were not clearly erroneous. The Bankruptcy Court and the United States Court of Appeals for the Fifth Circuit determined that the legal conclusion that Respondent should not be denied discharge in bankruptcy on these grounds inexorably followed these findings of fact. Petitioner having failed to show that the United States Court of Appeals for the Fifth Circuit has departed from the accepted and usual course of judicial proceedings, Respondent prays that this Court deny Colonial Bank's Petition for Writ of Certiorari

to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

J. Murray Akers
AKERS & GRIFFIN
149 N. Edison, Suite B
P.O. Box 1076
Greenville, Mississippi 38701
(601) 378-2131

Attorney for Respondent